

6

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. G. CRITZER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error from the United States District
Court for the District of Idaho, Northern
Divison.*

JOSEPH J. LAVIN,

Attorney for Plaintiff in Error,

Spokane, Washintgon.

FILED

FEBRUARY 1914

IN THE
United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. G. CRITZER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error from the United States District
Court for the District of Idaho, Northern
Divison.*

JOSEPH J. LAVIN,

Attorney for Plaintiff in Error,

Spokane, Washintgon.

THE ISSUES.

On November 21, 1923, the United States Attorney for the District of Idaho filed an Information in the Northern Division of the District Court for the District of Idaho, charging the defendants W. G. Critzer and Ray W. (John Doe) Hayden with a violation of the National Prohibition Act (Tr. 10). The Information contains three counts. The first count charged the defendants with the unlawful possession of a quantity of intoxicating liquor; the second count, the unlawful transportation of the identical liquor referred to in the first count; and the third count, a libel against the automobile in which the intoxicating liquor referred to in the first and second counts, was alleged to have been transported.

The case came on regularly for trial, and the jury returned a verdict of guilty as to the defendant Critzer on all of the counts, and a verdict of not guilty on all the counts as to the defendant Hayden (Tr. 16).

Thereafter, the defendant Critzer seasonably filed a Motion in Arrest of Judgment, and, in the alternative, for a New Trial (Tr. 35), which Motions were denied (Tr. 40), and exception allowed (Tr. 40). Judgment was thereupon entered upon the verdict of the jury, and the defendant Critzer was ordered to pay a fine of Two Hundred and Fifty (\$250.00)

Dollars on the first count, and Five Hundred (\$500.00) Dollars on the second count (Tr. 41-42), from which judgment and sentence, this Writ of Error is prosecuted upon the Assignments of Error heretofore filed (Tr. 45-46), which said Assignments of Error are as follows:

I.

The Court erred in refusing to grant the Motion of the defendant W. G. Critzer, made at the conclusion of the evidence of the Government, challenging the sufficiency of the evidence to justify the same being submitted to the jury.

II.

The Court erred in overruling the defendant's Motion for judgment and acquittal, notwithstanding the verdict of the jury.

III.

The Court erred in overruling the defendant's Motion in Arrest of Judgment.

IV.

The Court erred in overruling the defendant's Motion for New Trial.

V.

The Court erred in entering judgment upon the verdict of the jury and in sentencing the defendant upon the verdict of the jury.

VI.

The Court erred in overruling the defendant's Motion in Arrest of Judgment, for judgment of acquittal, and for New Trial, and in entering judgment upon the verdict, and in refusing to set said verdict aside upon the ground and for the reason that the verdict of the jury, finding the defendant Hayden not guilty and the defendant Critzer guilty, was absurd, *repugnant to the verdict of the jury*, and inconsistent.

THE FACTS.

On November 7, 1923, Deputy Sheriffs of Bonner County, Idaho, having received information that intoxicating liquor was being transported through that county by automobiles, drove to a point near Deep Creek, a few miles distant from the county seat. They erected a barrier across the roadway and secreted themselves nearby. About 4:00 o'clock, the following morning, three automobiles approached. The first car "jumped" the barrier and proceeded westerly out of view. The second car did likewise, and the third car turned quickly and went easterly. They followed the third car easterly some distance, but were unable to overtake it. They then returned to a point a short distance west of the point where they had placed the barrier, and found an automo-

bile which had left the traveled portion of the roadway, settled into a soft, marshy portion of the roadway, and one of the rear wheels marooned against a log. They did not see the driver, who had deserted the car. A large quantity of intoxicating liquor, in sacks, was lying upon the ground near the automobile, two of the sacks of liquor resting against the running board of the car. The car was a Hudson speeder, and bore a leather tag holder on the dashboard, containing the name of W. G. Critzer, of Spokane, and was the property of the defendant, W. G. Critzer. Shortly thereafter, a man called at a telephone office at Moravia, a station on the Great Northern Railway Company line, about four miles distant from the point where the automobile was found, and requested of the lady in charge of the telephone office that he be permitted to use the telephone (Trans. 211). She testified the man said his name was Hayden, and he desired to call Main 606 at Spokane. She could not identify the man who placed the call (Trans. 22). A daughter of the telephone operator testified that the man giving the name of Hayden, after calling the number, Main 606, said: "Is this 'home'?" and he said, "Tell Joe I have lost everything. Will be in on 43." And he further said, "Look out for Grant." (Tr. 23.) The man's clothes were damp, and he spoke about

coming through wet grass and weeds (Tr. 23); she could not identify the person placing the call (Tr. 23). An employee of the telephone company testified that the records at Spokane showed that the telephone number, Main 606, was issued to S. 7 Stevens Street, Spokane, upon the application of R. J. Critzer, under the name of Elite Cigar Store (Tr. 23). D. E. Dunning, City License Inspector of Spokane, testified that a license for the Elite Cigar Store was issued April 25, 1923, to W. G. Critzer, the application being signed, "W. G. Critzer, by R. J. Critzer."

At the conclusion of the Government's case, there being no evidence that the defendant Hayden was ever seen in or about the automobile in question, and no evidence that he had ever possessed or transported the intoxicating liquor in question, the defendant requested the Court to instruct the jury to return a verdict of not guilty, which motion, the Court denied. At the same time, the same motion was made in behalf of the defendant Critzer, there being no evidence that he ever possessed or transported the liquor in question, and no evidence against him of any character saving and excepting that the automobile in question belonged to him.

The jury, having found the defendant Hayden not guilty on all counts of the Information, and the de-

fendant Critzer guilty on all of the counts, the evidence will be discussed only in so far as it concerns the defendant Critzer. We ask counsel to refer to any part of the evidence offered by the Government as a part of its case to justify the submission of the question of the guilt of Critzer to the jury. Mere ownership of the automobile in question was not sufficient. Suppose that Critzer had been sued for damages for injuries sustained by a person, and the plaintiff offered no evidence against him saving and excepting that a car owned by him, or bearing a license issued in his name, had caused the injury, and that there was no evidence as to who was driving the car at the time. Would such conduct be sufficient to put him to his proof. And if such rule exists in a civil action, does it not apply with equal, if not greater force, in a criminal action? The Government alleged in the information that Hayden and Critzer possessed and transported the liquor in question. The jury, by its verdict, found that Hayden did not possess nor transport the liquor, but that Critzer did. But even though it be assumed that proof that the license upon the automobile in question, found upon the car, and the driver's license stood in the name of W. G. Critzer, and that such facts gave rise to the presumption, without any evidence upon the subject, that the W. G. Critzer there

referred to was the defendant W. G. Critzer, and that the Court, in passing upon the motion for directed verdict, was justified in presuming that no one but the defendant W. G. Critzer was the driver of the car, your Honors' attention is respectfully directed to the record (Tr. 27) where will be found an admission made by the Government that Critzer was not driving the car; was not in the vicinity of Bonners Ferry at the time in question, but was at Spokane at the time of the seizure of the car and its contents (Tr. 27). This admission was made when the defendant sought to offer evidence that he had nothing to do with the possession or transportation of the liquor in question. Having in mind that the Government was entitled to the benefit of any evidence favorable to it offered by the defendant, after the denial of the motion, the record discloses positive and undisputed evidence that he was not driving the car in question, but was in Spokane all the time (Tr. 27); that he had no knowledge his car was being used for the transportation of liquor (Tr. 31); that he had no interest in the Elite Cigar Store, S. 7 Stevens Street, Spokane, nor the telephone number, Main 606 (Tr. 32); that he sold his interest in the Cigar Store in June, 1923, to a brother, R. J. Critzer, and went to California, and returned to Spokane in August, 1923.

Upon the facts, as herein contained, where is there any evidence that justified the jury in finding that the defendant Critzer possessed or transported the liquor in question? If there be such evidence, or any circumstances of any kind, counsel for the defendant in error should make reference to it in their brief.

ARGUMENT.

The Assignments of Error will be found at pages 45-46 of the Transcript. They embrace the error in the denial of the motion for a directed verdict at the conclusion of the Government's case; the denial of the motion for a judgment of acquittal, notwithstanding the verdict of the jury; the denial of the Motion for a New Trial; and the question of the inconsistency of the verdict, for the reason that the Government having alleged and having contended that Hayden was driving the car as the agent of the defendant Critzer, a verdict finding that the defendant Hayden did not possess and did not transport the intoxicating liquor, or finding him not guilty, renders the verdict of guilty as against the defendant Critzer inconsistent.

These Assignments of Error will be discussed separately in the order of their assignment.

I.

THE COURT ERRED IN REFUSING THE MOTION OF THE DEFENDANT CRITZER, MADE AT THE CONCLUSION OF THE GOVERNMENT'S EVIDENCE FOR A DIRECTED VERDICT OF NOT GUILTY BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE. (Tr. 26.)

As heretofore suggested, there was no evidence whatever offered against the defendant Hayden. No witness testified that he was ever seen in or about the automobile in question. The only evidence against the defendant Critzer was that an automobile bearing a license number issued to him, and a driver's license bearing the name of W. G. Critzer, was found upon an automobile beside the roadway near Bonners Ferry, Idaho, over one hundred miles distant from Spokane. No witness testified, and no evidence was offered that Critzer was ever seen in or about the automobile, and the Government made no contention that Critzer was driving the car, or that he was in or about the car, but conceded that at the time of the seizure of the car, Critzer was in Spokane. Under the law, the presumption is that he was not guilty. A mere statement of the facts, making such statement most favorable to the Government, will immediately bring one to the conclu-

sion that the Court must have reached the conclusion that the mere fact that the automobile in question bore the license number issued to one W. G. Critzer, was sufficient to justify the presumption that the W. G. Critzer referred to was the defendant, W. G. Critzer, and put the burden upon the defendant of establishing his innocence. As we have heretofore suggested, mere proof of the ownership of the car in question would not make the defendant liable in a civil action, nor in a criminal action, and the motion should have been granted.

Assignment 2, 3, and 4 (Tr. 46), raise practically the same question as has been discussed under the foregoing assignment, and the argument there made is peculiarly applicable to these assignments. There was no evidence of any kind or character offered against the defendant Critzer, saving and excepting proof of the ownership of the car, and the Court should have granted the defendant's motion in arrest of judgment and should have granted a New Trial, both of which were presented to the Court and overruled (Tr. 40).

VI.

THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION IN ARREST OF JUDGMENT, FOR JUDGMENT OF ACQUITTAL, AND

FOR NEW TRIAL, AND IN ENTERING JUDGMENT UPON THE VERDICT, AND IN REFUSING TO SET SAID VERDICT ASIDE UPON THE GROUND AND FOR THE REASON; THAT THE VERDICT OF THE JURY, FINDING THE DEFENDANT HAYDEN NOT GUILTY AND THE DEFENDAN CRITZER GUILTY, WAS ABSURD, REPUGNANT TO THE VERDICT OF THE JURY, AND INCONSISTENT.

It is contended under this assignment of error that the Court should have set the verdict aside for the reason that the verdict of the jury, finding the defendant Ray W. Hayden not guilty, and finding the defendant W. G. Critzer guilty, is inconsistent (Tr. 35). The Information, as will be observed (Tr. 11-13), charged the defendants Ray W. Hayden and W. G. Critzer with the unlawful possession and transportation of intoxicating liquor in the automobile hereinbefore referred to, and it was contended by the Government that the defendant Hayden was the driver of the automobile in question, and, as such, acted as the agent of and for, and in behalf of the defendant Critzer, either under some terms of employment or upon a contingent basis, or that the defendant Hayden and the defendant Critzer had a joint partnership for the purpose of transporting the liquor, or that the defendant Critzer

had employed the defendant Hayden to transport the intoxicating liquor in question; and these facts, the Government stated they would establish by evidence, and these facts they sought to establish by their evidence, and the Court instructed the jury that unless they found, from the evidence, beyond a reasonable doubt, that the Government had established these facts, then the jury should return a verdict of not guilty as to the defendant Critzer. The instruction given by the Court upon this subject, was as follows (Tr. 33 and 34):

“The Court erred in overruling the defendant’s Motion in Arrest of Judgment, for judgment and acquittal, and for New Trial, and in entering judgment upon the verdict, and in refusing to set said verdict aside upon the ground and for the reason: that the verdict of the jury, finding the defendant Critzer guilty, was absurd, repugnant to the verdict of the jury, and inconsistent.”

The Government, having contended that the venture in question was a joint venture between the defendants Hayden and Critzer, and Court having instructed that before the defendant Critzer could be found guilty, that the jury would be bound to find, from the evidence, beyond a reasonable doubt, that some relationship existed between Hayden and Critzer, either upon the theory of employment or upon the theory of agency, and the jury, having found that the defend-

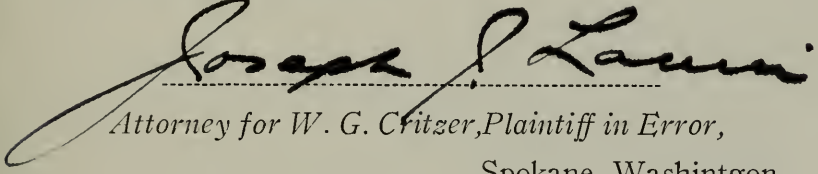
ant Hayden was not guilty, that he did not possess and did not transport the liquor in question, that a verdict finding the defendant Critzer guilty is entirely inconsistent and repugnant to the finding of the defendant Hayden not guilty, for the reason that if the Government alleged and was required to prove a joint venture, manifestly, it would be necessary to convict Hayden, whom the Government contended was the agent of Critzer, before Critzer could be convicted for the acts of his alleged agent, and the jury, having found that the alleged agent was not guilty, then, surely, the claimed principal could not be guilty.

The charge contained in the Information was that of a misdemeanor. It is conceded by the Government (Tr. 27, 28) that at the time of the commission of the offense, Critzer was not in the State of Idaho, nor in the jurisdiction of the within entitled Court, but was in the State of Washington. Critzer, under the charge in this case, could not be guilty of any offence, for the reason that he never was within the jurisdiction of the Court where the action was tried.

All of the questions here presented were properly raised during the trial of the case by Motion of Directed Verdict, by Motion in Arrest of Judgment,

Motion for New Trial, and Judgment of Acquittal, and it is respectfully urged that a consideration of the matters herein presented should result in the reversal of the judgment herein.

Respectfully submitted,

A handwritten signature in cursive script, reading "Joseph J. Lavin". The signature is written in black ink and is positioned above a horizontal dashed line.

Attorney for W. G. Critzer, Plaintiff in Error,

Spokane, Washintgon.

Handwritten text, possibly a signature or name, located in the upper middle section of the page.